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SUPREME COURT U. S.

No. 122

In the Supreme Court

OF THE

United States.

October Term, 1903.

D. E. WHEELER and D. W. RIDENOUR, co-partners doing business under the firm name and style of Wheeler & Ridenour,
Petitioners,

vs.

THE COUNTY OF PLUMAS,
Respondent.

PETITION FOR REHEARING.

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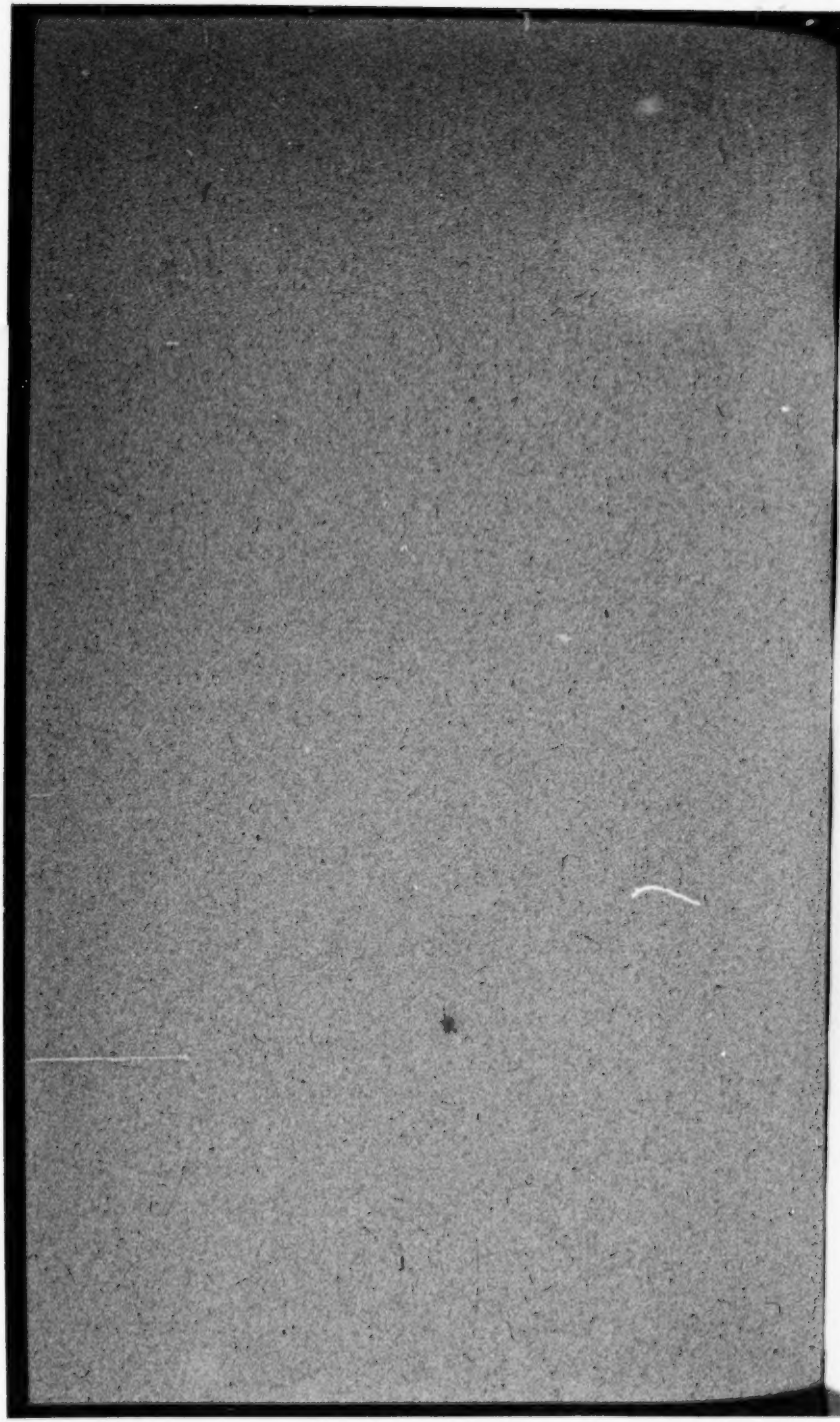

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To the Honorable Melville W. Fuller, Chief Justice, and Associate Justices of the Supreme Court of the United States:

This case was heard with and, on the 20th day of February, 1905, decided on the authority of No. 121, Flanigan v. the County of Sierra, and the defendant in error now presents its petition for rehearing herein, and states the grounds thereof as follows:

FIRST: That the California cases cited in the opinion in Flanigan v. the County of Sierra, do not support that portion of the opinion which holds that the ordinance is a revenue measure. We think the California courts have not yet considered the question whether this ordinance, or any other ordinance, directed against this business, is a revenue or a regulatory measure.

Prior to the Act of 1901 this question had never been material in any case before the California courts, involving a sheep license ordinance, nor had the pleadings in any of those cases raised the question whether such an ordinance was regulatory or for revenue. This condition is doubtless due to the fact that all of the California cases involving sheep license ordinances cited in the opinion arose prior to the Act of 1901, and prior to that Act it was clearly within the law of California to license this business for the purpose of revenue, or for the purpose of regulation, or for the purposes of revenue and regulation.

In 73 Cal. 365 (Ex parte Mirande) the character of the ordinance there involved was suggested to the Court, but that suggestion was answered by the holding:

> "We do not deem it necessary to discuss the question as to whether the license in question is imposed for revenue purposes, or for purposes of regulation, for the reason that the Board possessed authority to impose it for either, or both."

The Act of 1901 repealed the power to license for revenue, but left unaffected the power to license for purposes of regulation, and boards of supervisors having, at the time ex parte Mirande was decided, the power to license this business for regulatory purposes, still have that power, for the reason that the legislature has not taken it away, nor has the doctrine of that case been overruled, or in any manner modified.

72 Cal. 387 (Lassen County v. Cone) was decided after a trial on the merits, at which trial it was shown and found by the Court that defendant owned a large quantity of land in plaintiff county, upon which his sheep were grazed. It appears further that the board of supervisors passing this ordinance regarded it as a revenue measure (388). The Court held that ordinance invalid because it discriminated "in favor of those engaged in the business of " raising sheep in Lassen County, as against per- " sons who raise sheep and pay a tax upon them in " other counties", etc.

119 Cal. 119 (County of Inyo v. Erro) did not involve an examination of the question as to the purpose or purposes for which the license tax was imposed, nor is that question discussed in the opinion.

In Town of Santa Monica v. Guidinger, 137 Cal. 658, the ordinance on its face recited that it was for the purpose of revenue, as well as for regulation.

In City of Sonora v. Curtin, 137 Cal. 583, an attempt was made to levy a license tax upon the business of practicing law, and the Court held that such business could not be subjected to police regulation, for the reason that the business is not dangerous to the public, either directly or indirectly.

We think the distinction between the case at bar and the last two cases cited is clear.

> "An opinion in a particular case founded on its special circumstances is not applicable to cases under circumstances essentially different." (Mr. Chief Justice Marshall) Brooks v. Marbury, XI Wheat. 91.
>
> "The language of a decision must be considered in the light of the circumstances involved in the case before the Court." Coburn v. Brooks, 78 Cal. 446.

If the decision in this case be allowed to stand, it results that in every instance in California where a license fee is imposed upon the business of raising, grazing, herding or pasturing sheep, the ordinance so imposing such license tax is, *as matter of law,* a revenue measure, and this too, without any regard to the expense that the transaction of this business within a county may entail upon such county, and without regard to the fact that the expense which such business may cause a county, cannot be determined in advance.

If, under the record in this case, or any conceivable state of facts, the business mentioned in

the ordinance in question can be properly made a subject of police regulation, then we submit that it cannot be determined as a mater of law that this ordinance is not a regulatory measure. It may be that a trial on the merits would show it to be a revenue measure, but that trial has not been had, hence, it has never been shown to be that character of measure. Under certain conditions we think the business mentioned in this ordinance may properly be subjected to police regulation, and if this be true, it will require an examination of all the facts to determine whether or not this ordinance be a regulatory or revenue measure.

The Legislature of California has, in effect, said (and such was the law at the time of the passage of the ordinance here involved) that counties may license the business of raising, grazing, herding and pasturing sheep, and fix the rate of license tax upon the same for purposes of regulation, and if it can be shown at the trial that the license tax so fixed is reasonably necessary for the purpose of paying the costs of regulating the business, the ordinance then would surely be upheld as a valid exercise of police power.

With full deference to the Court, we suggest that neither of the five cases cited in the opinion is authority for holding the ordinance involved in this case to be an ordinance for the purpose of revenue.

That in the judgment of the Legislature of the State of California the power still remained in the

boards of supervisors of this State to license this business for the purposes of regulation is evidenced by an Act adopted two years after the Act of 1901 went into effect, found in the statutes of 1903, p. 41, and entitled "An act restricting the powers of "boards of supervisors in the matter of imposing "licenses upon the business of raising, herding, "grazing and pasturing sheep." The Act may be regarded as a legislative construction of the Act of 1901, and so regarding it, it is clear that the Legislature of this State recognized that after the Act of 1901, the power to so impose a license upon this business existed, and by this Act fixed the maximum fee that might be thereafter charged at five cents per head. Further, that the Legislature realized that regulatory ordinances imposing a higher license than this were then in force throughout the State is made certain by the saving clause contained in this Act, and reading as follows:

> "*provided,* the provisions of this act shall not apply to any license tax the validity of which is involved in any suit now pending, or to any such license tax due when this act takes effect."

When this Act took effect the suit at bar was pending, and the license tax therein claimed was due.

That the Legislature of this State regarded this business as one properly falling within police regulation, because its transaction affected the interests of the public, is evidenced by the Act of the same Legislature, designed for the purpose of regulating

certain phases of this business, found in the said statutes of 1903 at page 372, and entitled:

> "An act to create the office of sheep inspector for the State of California, to provide for the appointment, and to define the powers and duties of said officer and his deputies, and their compensation, and providing for the prosecution of offenses under the same and to suppress and prevent dissemination of scab among sheep."

Reading these two acts under the law as declared in Ex parte Mirande, supra, it seems clear that the power to license this business for the purpose of regulation still exists, as declared by the highest court of this State to exist prior to the Act of 1901, and further emphasized and safe-guarded by legislative enactments subsequent to that Act.

We respectfully repeat that it cannot be determined *as matter of law* that the ordinance involved here is a revenue measure, but, on the contrary, the power to license for regulation existing, it should be held to be a regulatory measure until the contrary is made to appear by a trial on the merits.

SECOND: The Circuit Court of Appeals took the view that the license tax sought to be recovered in this case is in the nature of a debt—a duty to pay—and therefore that the repeal of the ordinance, if repeal had been made, did not destroy the right of recovery. In so holding the opinion of the Circuit Court of Appeals is fully supported by the case of San Luis Obispo v. Hendricks, 71 Cal. 243, a case decided by the Supreme Court of the State

of California in bank, and to which we neglected heretofore to call the Court's attention. Discussing a license tax of the same nature as that involved in this case, the Court say:

> "The license tax sought to be recovered in this action is not a penalty, but in the nature of a *debt* due from the defendant to the county, or what is the same thing for present purposes, a duty devolved upon the defendant personally, which can be enforced precisely as though he had contracted with the county to pay such sum of money" (p. 245).

This point does not appear to have been considered by the Court in Sonora v. Curtin, nor is this case, or those cited in the opinion of the Circuit Court of Appeals, there reviewed.

A question decided without argument remains still an open question.

(Per Baldwin, J.), Decatur v. Pauling, 14 Pet. 607.

It is therefore respectfully submitted that a rehearing should be granted.

U. S. WEBB and
L. N. PETER,
Attorneys for Petitioners.

I hereby certify that the above and foregoing petition for a rehearing in my judgment is well founded and is not interposed for delay.

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